STREETS—SUBWAYS AS ADDITIONAL BURDENS.—Condemnation proceedings were instituted for acquiring the fee of certain lands for street purposes and the damages were settled by the Commissioners, but before the final award was made the appellant learned of a proposal to extend a subway in the proposed street. He thereupon called for the Commissioners to estimate his damages, contending that a subway was made a public highway under the Rapid Transit Act. The Commissioners refused as a matter of law to estimate his damages; *held* that the refusal was proper. *In re New Street in the City of New York* (N. Y. 1915) 109 N. E. 104.

Under reasons both historical and legal, the City of New York, in the construction of a subway, is acting in its proprietory capacity, *In re Board of Rapid Transit Com'rs,* 112 N. Y. Supp. 619. Another basic consideration lies in the fact that a subway is an exclusive occupation of the land and not a "street use as the term is used in law." Herein New York differs from Massachusetts, for in the latter state a subway is considered a public use and not as an additional servitude, *Sears* v. *Crocker et al, Merchants' National Bank* v. *Same, John C. Gray et al, Trustees v. Same,* 184 Mass. 586; *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.,* 182 Mass. 397; *Eustis* v. *Milton Street Railway Co.,* 183 Mass. 586. When the subway is considered an additional servitude the abutting owner, whether the fee is in the city or whether the city has merely an easement for surface use, can collect damages for the removal of lateral support and a condemnation for street purposes does not include the subway purpose, *In re Board of Rapid Transit Com'rs,* supra. That is, a subway is not contemplated in the condemnation for public purposes, and not within the rule of *Radcliff's Exec.* v. *Mayor & of Brooklyn,* 4 N. Y. 195 which refers only to contemplated uses, and *March* v. *City of New York,* 74 N. Y. Supp. 1151, where no damage was claimed. The holding in the principal case is but an outgrowth of the New York decisions meeting in full the demands of the Rapid Transit Act, authorizing the condemnation of the rights of abutting owners in order to construct a subway. The court in affirming the action of the Commissioners has acknowledged that three condemnation proceedings are necessary to give the municipality full right to use the streets: one, to obtain the surface use; second, to construct elevated railroads, *Story* v. *New York Elevated Ry.,* 90 N. Y. 122, *Rose* v. *New York & H. R. Co. et al.,* 95 N. Y. Supp. 711; and third, to construct a subway. Further, in proceedings instituted for one purpose, damages for another need not be awarded.

WILLS.—COMPETENCY OF SUBSCRIBING WITNESS.—Where one of the subscribing witnesses to a will was president of, and a stockholder in, the corporation named as trustee, it was *held,* that he was a competent witness, such as is required by NEB. REV. ST. 1913, § 1290. *In re Wiese's Estate* (Neb. 1915), 153 N. W. 556.

The sustaining of this devise depends upon the provisions of two statutes: first, whether, under the provision requiring competent subscribing witnesses, he was such a witness; and second, whether, under the provision declaring gifts to witnesses void, this devise in trust was void by reason of the bene-

ficial interest of this subscribing witness. In answer to the first question it must be admitted as the prevailing view that only a direct, immediate and beneficial interest will disqualify one as a competent subscribing witness. *Jones* v. *Tibbets,* 57 Me. 572; *Hawes* v. *Humphrey,* 9 Pick. 350, 20 Am. Dec. 481; *Lord* v. *Lord,* 58 N. H. 7, 42 Am. Rep. 565. It is obvious that the trustee in this case would receive no such direct or beneficial interest or gift as would render him incompetent, for his reward, if any, would only be in the nature of compensation for services rendered. Where an executor was an attesting witness, the fees accruing to him as an executor did not render him incompetent as a witness. *In re William's Will,* (Mont.) 145 Pac. 957; *Jones* v. *Grieser,* 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 957. But as to the second point, whether the beneficial interest, although not sufficient to render him incompetent as a subscribing witness, was of such nature as to render the devise in trust void: in ROOD, WILLS, § 210, it is said that only beneficial gifts to subscribing witnesses are avoided by the Statutes. In interpreting such an interest as would render the devise void the court in *Conrades* v. *Heller,* 119 Md. 448, 87 Atl. 28, held that where a devise was made to a church, the devise was not invalidated because a member of such church acted as a subscribing witness; in *Boyd* v. *McConnell,* 209 Ill. 396, 70 N. E. 649, that trustees of a college which was a beneficiary, acting as subscribing witnesses did not avoid the gift; in *Kennett* v. *Kidd et al.,* 87 Kan. 652, 1914, A Ann. Cas. 592, a gift to Modern Woodmen Society was not avoided because certain members of the order were subscribing witnesses; in *Cresswell* v. *Cresswell,* L. R. 6 Eq. 69, it was held that a gift to a subscribing witness in trust was valid. It is perfectly clear that upon the authority of these cases an officer or stockholder in a corporation named as trustee has no such beneficial interest as would render the bequest void. But the court in the principal case goes still further and by way of *dictum* indicates its opinion as to the proper method of procedure, if the devise were void as far as the trustee were concerned, when it says that equity will never allow a trust to fail for the want of a trustee and that a competent one should be appointed in such case to carry out the expressed intention of the testator.